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In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

PETITIONERS' REPLY BRIEF

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REPLY TO NEW ISSUES RAISED IN RESPONDENTS' OPPOSITION BRIEF

Petitioners reply to two issues raised for the first time in the United State's Brief in Opposition. Petitioners, in their Petition for *Writ of Certiorari,* only addressed the issue upon which the Ninth Circuit Court of Appeals dismissed their case, Petitioners' failure, under Rule 19(b) of the Federal Rules of Civil Procedure, to join the Hopi Tribe which the Ninth Circuit deemed to be an indespensable party. The opinion of the Ninth Circuit did not address the merits of Petitioners' claim.

In its Brief in Opposition the United States, made arguments relating to the underlying merits of this case. These specific arguments are:

1) Dismissal of Petitioners' Free Exercise of Religion Claim, On The Merits, Is Required By This Court's Decision In *Lyng v. Northwest Indian Cemetery Protective Association.*[1]
2) Petitioners' Free Exercise Claim Also Fails Under This Court's Decision In *Employment Division, Department of Human Resources of Oregon v. Smith.*[2]

I. The Decision in *Lyng v. Northwest Indian Cemetery Protection Association* Does Not Alter The Traditional First Amendment Analysis And Does Not Warrant Dismissal of Petitioners' Claims On The Merits

The District Court dismissed Petitioners' First Amendment claim, relying on this Court's decision in *Lyng.*[3] However, the factual circumstances of the instant case and *Lyng* are totally different making the rationale of Lyng inapplicable. In *Lyng* this Court determined there was no First Amendment violation because it was only the "incidental effects of government programs" that were found to impact on the *Lyng* claimants

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[1] 485 U.S. 439, 108 S.Ct. 1319 (1988).
[2] 494 U.S. 872, 110 S.Ct. 1595 (1990).
[3] *Manybeads v. U.S.*, 730 F.Supp. 1515 (D.Ariz. 1989).

religion. However, the *Lyng* majority made unmistakably clear that the traditional Free Exercise analysis of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) was still operative:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. . . . . .

Lyng 485 U.S. at 450, 108 S.Ct. at 1326 (citing *Sherbert*).

Lyng holds that "incidental effects of government programs, which may make it more difficult to practice certain religions **but which have no tendency to coerce individuals to act contrary to their religious beliefs, [do not] require the government to bring forward a compelling justification for its otherwise lawful actions."** *Lyng, Id.*. (emphasis added) .

Lyng involved an unusual factual situation completely unlike the one at hand. The Indian claimants in *Lyng* were attempting to challenge a government construction program on unoccupied non-reservation land under the jurisdiction of the U.S. Forest Service. The Indian tribes involved had no claim of past or present occupancy. In sharp contrast, the Petitioners have legally occupied the land at issue, conducting religious ceremonies and burying their loved ones there, for hundreds of years.

In *Lyng* the Indians' claim that the construction program burdened the exercise of their religion was based on the "indirect effects" of Forest Service programs conducted on unoccupied Forest Service land. Tribal members merely contended that the construction of a road would make some of their religious practices "more difficult".

In contrast, this case involves an Act of Congress[4] that requires Petitioners to act in violation of their religion and affirmatively abandon their sacred land which is the cornerstone of traditional Navajo religion. The forced removal of the Petitioners from their religious homeland will

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[4] Navajo-Hopi Land Settlement Act of 1974, Pub.L.No.93-531, 88 Stat. 1712.

result in the total prohibition of future religious practices. Moreover, the challenged governmental actions here include, *inter alia*; the forced eviction of Petitioners from their homes; the seizure of Petitioners' livestock; a ban on construction prohibiting the construction of decent and safe homes, as well as religious structures, roads, sanitation, health and school facilities; and the complete denial of federal services and benefits to those who refuse, for religious reasons, to be relocated.

These government actions do not merely have an "incidental effect," they directly penalize Petitioners and serve to coerce them into acting contrary to their religious beliefs by denying them adequate food, housing, and the infrasturcture necessary to remain on their ancestral land. These affirmative acts of the federal Defendants combine to force Petitioners to either abandon or seriously alter their ceremonial practices which constitute the core of the free exercise of their religion.

It is this critical distinction which separates the instant case from *Lyng* and other free exercise cases such as *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986), which involved only the "incidental effects" of government programs rather than coercive governmental actions which unequivocally penalize the exercise of religion. Neither *Lyng* or *Bowen* involved Acts of Congress that effectively compel persons to violate their religion.

This Court in *Lyng* could hardly have made this distinction more clearly than when it stated:

> In both cases [*Lyng* and *Bowen*], the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs. **In neither case however, would the affected individuals be coerced by the government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.** (emphasis added).

Lyng at 485 U.S. at 449, 108 S.Ct. at 1325.

In *Lyng* this Court referenced its decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to illustrate the distinction between government

actions which merely impact on religion and those which affirmatively and directly coerce a person to act contrary to their religious beliefs. The distinction constitutes the difference between constitutional and unconstitutional governmental conduct.

> . . . [T]here is nothing whatsoever in the *Yoder* opinion to support the proposition that the "impact" on Amish religion would have been constitutionally problematic if the statute at issue had not been **coercive** in nature. (emphasis added).

485 U.S. at 457, 108 S.Ct. at 1329.

Moreover, the majority opinion by Justice O'Connor unequivocally states that had the *Lyng* case involved a statute, such as exists in this case, which prohibited the Indians from acting in accordance with their religion or was coercive in nature, the constitutional consequences would have been different.

> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, **a law forbidding the Indian respondents' from visiting the Chimney Rock area would raise a different set of constitutional questions.**

485 U.S. at 453, 108 S.Ct. at 1327.

Finally, the government's actions in this case which violate the First Amendment and its trust obligations to Petitioners are not "otherwise lawful actions" as required in *Lyng, Id.*

This Court also emphasized in *Lyng* that the government had, in juxtaposition to the instant situation, done everything possible, short of abandoning the project, to accommodate the Indians' religious needs: "Except for abandoning its project entirely . . ., it is difficult to see how the government could have been more solicitous." 485 U.S. at 454. 108 S.Ct. at 1328.

In the instant case the federal Defendants have made no meaningful effort to accommodate Petitioners' religious needs. It is clear from the evidence presented below that merely offering Petitioners "access" to their former land for religious purposes is meaningless when the Navajos will be relocated hundreds of miles away from those sacred

areas.[5] This fact is of critical importance to Petitioners because as the *Lyng* Court recognized, accommodation is required to comply with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian. . . including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights." *Lyng Id.* (quoting the American Indian Religious Freedom Act, 42 U.S.C. 1996).

II. The Decision in *Employment Division v. Smith* is Not Controlling in This Case.

Smith decided a First Amendment claim brought by members of the Native American Church who were fired from their jobs for using peyote. They were denied unemployment benefits because they were deemed to have been justly fired for engaging in misconduct. The Indians challenged the denial of unemployment benefits on free exercise grounds as they used peyote as a religious sacrament. 110 S.Ct. at 1597-1598.

This Court ruled that the Oregon state statute at issue need not be subjected to the compelling interest test of *Sherbert, supra.*, and *Yoder, supra.*, because any burden on the complainants' religion. was not the result of direct governmental action directed at religious practices but merely the indirect effects of a neutral law. "[W]e would not apply it [compelling interest test] to require exemptions from a generally applicable criminal law." 110 S.Ct at 1603.[6]

This Court concluded that the statute in *Smith* did not place a burden on religion because it involved only the "incidental effects of a

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[5] Accommodation could include conducting investigation or research into the impact of the relocation program on Petitioners' religious practices or, at least, reviewing the existing information already available and identifying less restrictive alternatives to further relocation. At a minimum, the Government could present these findings to Congress and recommend that Congress consider alternative land or compensation which might be provided to the Hopi Tribe in exchange for the small, but essential sections of land still occupied by Petitioners. The United States could also support a permanent solution to the problem rather than the current lease arrangement that merely continues the long standing dispute.

[6] The "compelling interest" test was subsequently restored by Congress for purposes of free exercise of religion claims, including petitioners', by the Religious Freedom Restoration Act, 42 U.S.C. 2000 bb, et seq.

generally applicable" statute, rather than coercive government action which directly inhibits the exercise of religion. 110 S.Ct. at 1600.

The distinctions between the instant case and *Lyng, supra.* and *Roy, supra.,* apply with equal force to *Smith*. The 1974 Settlement Act is not a neutral, generally applicable, government program. It applies only to a small portion of the Navajo Nation, including Petitioners, who are compelled by a federal statute to relocate in violation of the tenets of their religion and which relocation prohibits the further exercise of their religion.

Furthermore, in response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA), 42 USC 2000 bb et seq. in 1993. RFRA effectively overruled *Smith* by restoring the "compelling interest" test as set forth in *Yoder, supra* and *Sherbert, supra,* to all cases where the free exercise of religion is substantially burdened

The Congressional findings and declarations of purposes of the RFRA state in part:

> (a) Findings. The Congress finds that --
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws `neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) government should not substantially burden religious exercise without compelling justification...
>
> *42 U.S.C. 2000bb(a).*
>
> (b) Purposes. The purposes of this Act are:
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
>
> *42 U.S.C. 2000bb(b).*

RFRA provides that government can not, "substantially burden a person's exercise of religion" even if the burden results from a neutral rule of general applicability unless the government can demonstrate that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *42 U.S.C. 2000bb-1.*

Congress made RFRA applicable, "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act..." 42 U.S.C. 2000bb-3

In 1997, this Court addressed the constitutionality of the RFRA in a case involving a challenge to a denial of a church building permit by municipal zoning authorities. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997). This Court found that RFRA was unconstitutional as applied to state and local law because Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment.

This Court stated: "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the states." *Id.*117 S.Ct. at 2162. Congress' power under Section 5 is "remedial" and extends only to "enforcing" the provisions of the Fourteenth Amendment. *Id.* at 2164. Congress does not have, "the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.*

The *Flores* opinion concluded: "Broad as the power of Congress is under the ... Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 2171

This Court did not expressly address the question of the constitutionality of the RFRA's application to acts of the federal government. But the opinion's reasoning argues persuasively that the decision is limited to acts of state and local governments. Most courts that have considered the issue have concluded that this Court invalidated

RFRA only as applied to state and local law and that its application to action of the federal government remains at least an open question.[7]

In an opinion thoroughly analyzing the question the Eighth Circuit declared that despite *Flores*, "RFRA is constitutional as applied to federal law." (Emphasis in original) *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 856 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 43 (1998). The Eighth's Circuit's original opinion in *In re Young* was decided prior to this Court's decision in *Flores*. 82 F.3d 1407 (1996). After this Court rendered its decision in *Flores* it granted *certiorari* in *Young* and then vacated and remanded the case to the Eighth Circuit "for further consideration in light of *City of Boerne v. Flores*, 117 S.Ct. 2502 (1997). Upon reconsideration, the Circuit Court reinstated its previous decision. 141 F.3d 834. This Court then declined to review the reinstated opinion.

Significantly, the United States conceded below that RFRA does apply to its actions in this case. *Supplemental Brief of the United States* at pgs. 31-35.(February 22, 1999). The government's argument now that "[t]he *Smith* standard applies" (*Brief in Opposition* at 14) to the merits of Petitioners' claim contradicts its own prior acknowledgment that it is the

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[7] "[T]he Supreme Court held that RFRA was unconstitutional as applied to State and local governments. The Court, however, has not determined, and the parties do not contend, that RFRA is unconstitutional as applied to federal law" *Adams v. Comm'r of the Internal Revenue Serv.*, 110 T.C. 137 (U.S. Tax Ct. 1998).

"The constitutionality of RFRA as applied to the federal government has not yet been clarified, either by the Supreme Court or within the Eleventh Circuit. While the trend seems to be to limit *Boerne* to its holding, it remains a fairly open question." *Gunning v. Runyon*, 3 F.Supp.2d 1423, 1432-1433 (S.D.Fla. 1998).

"We will continue to assume, without deciding, that RFRA is constitutional as applied to federal law." *Worldwide Church of God v. Philadelphia Church*, 227 F.3d 1110 (9th Cir. 2000). See also *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 833-834 (9th Cir. 1999).

"[T]he Supreme Court has declared [RFRA] unconstitutional as applied to the states." *Spies v. Voinovich*, 173 F.3d 398, 403 (6Th Cir.1999).

Flores held "that RFRA is unconstitutional as applied to state governments." *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir.1998).

"[W]e assume, without deciding, that the RFRA applies to the federal government..." *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998).

compelling interest standard, as mandated by RFRA, that applies here. The 1974 Act is not a neutral and generally applicable law so the *Smith* decision would not apply. Even if it were RFRA, explicitly provides that such laws may not "substantially burden a person's exercise of religion" unless the government acts in furtherance of a compelling interest and unless it utilizes the least restrictive means.

Thus, the merits of Petitioners' claim must be analyzed under the traditional compelling interest standard regardless of whether the 1974 Act is found to be "neutral" or "generally applicable." Because *Smith* is inapplicable here and an examination of the facts reveals a far more substantial and direct burden of the free exercise of Petitioners' religion than was present in *Lyng*, Petitioners stand a significant chance of prevailing on the merits of their constitutional claim. In that Petitioners have no alternative forum in which to seek vindication of their constitutional right to the free exercise of religion, their petition should be granted.

Respectfully submitted.

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